Supreme Court, U.S.
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No. 95-1110

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARTHUR A. BLUMEYER, III, AND
JOHN W. PECKHAM, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in reversing the order of the district court granting a new trial.

1. Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of wire fraud, in violation of 18 U.S.C. 1343 (1988); mail fraud, in violation of 18 U.S.C. 1341 (Supp. V 1993); and conspiracy to commit wire fraud and mail fraud, in violation of 18 U.S.C. 371. Petitioner Blumeyer was also convicted of multiple counts of money laundering, in violation of 18 U.S.C. 1956 (1988 & Supp. V 1993).

On August 30, 1994, the district court granted petitioners' motion for a new trial on the ground of a juror's misconduct in speaking with an outside attorney during deliberations. Pet. App. 16A-35A. The district court first interviewed all of the jurors. Thereafter, relying on *Remmer* v. *United States*, 347 U.S. 227 (1954), the court held that the law required it to presume that the contact was prejudicial to petitioners, and that the government had not rebutted the presumption of prejudice that arose from the juror's contact with the outside attorney.

The court of appeals, in a divided opinion, reversed. Pet. App. 1A-15A. The court of appeals found that there was no evidence to support the district court's finding of an extrinsic contact on a substantive matter in the case, either factual or legal. Accordingly, the court concluded that petitioners were not entitled to a presumption of prejudice based upon the jury foreman's contact with the outside attorney; that petitioners had failed to show actual prejudice arising from the contact; and that even if the presumption of prejudice arose, the government had rebutted that presumption by proving that the contact was harmless beyond a reasonable doubt.

2. Petitioners contend (Pet. 7-12) that the court of appeals failed to follow this Court's decision in *Remmer* v. *United States*, *supra*, in not applying a presumption of prejudice to extrinsic juror misconduct. Petitioners also contend (Pet. 13-17) that the court below did not review the district court's factual findings under the abuse of discretion standard. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioners. After the imposition of sentence

by the district court, petitioners can again take an appeal to the court of appeals raising any issues that may be available to them and preserving the claims they have raised here. If the court of appeals affirms their convictions, petitioners will then be able to present their present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.